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Supreme Court, U.S.
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No. 85-1934

In the Supreme Court of the United States.

OCTOBER TERM, 1985.

DIGICOURSE, INC.,
PETITIONER,

v.

AMA DISTRIBUTORS, INC., ET AL.,
RESPONDENTS.

Petition for a Writ of Certiorari to the Court of Appeals for the Federal Circuit.

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32pp

Question Presented.

Where does the constitutional authority of the Court of Appeals for the Federal Circuit (CAFC) stop? Can the CAFC *on summary judgment*, deprive a patentee of its right to trial by jury guaranteed under the Seventh Amendment to the Constitution of the United States by ignoring the only record evidence of the meaning of the critical term of art in a patent claim and, substituting under the guise of *judicial notice* its own definition wholly contrary to the record evidence?

List of Parties.

Parties to the proceeding in the CAFC are (a) Digicourse, Inc., plaintiff, (b) AMA Distributors, Inc., defendant, (c) New Orleans Novelty Company, defendant, (d) Rowe International, defendant, and (e) S & H Distributing Company, Inc., defendant. Digicourse, Inc., is a wholly owned subsidiary of its parent, The Laitram Corporation. Neither Digicourse, Inc. nor the Laitram Corporation are affiliated with any other corporation.

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DIGICOURSE, INC.,
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v.

AMA DISTRIBUTORS, INC., ET AL.,
RESPONDENTS.

Petition for a Writ of Certiorari to the Court of Appeals for the Federal Circuit.

Digicourse, Inc., petitions for a writ of certiorari to review the decision of the CAFC in the case of Digicourse, Inc. v. AMA Distributors, Inc., et al.

Opinions Below.

The opinion of the CAFC is not recorded (Appendix, pp. 1a).

Jurisdiction.

The judgment of the CAFC was entered on April 28, 1986. Digicourse's Suggestion for Rehearing in Banc was declined on April 21, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

Statutes Involved.

Seventh Amendment to the Constitution of the United States provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

Statement.

Digicourse, Inc. ("Digicourse"), is the owner of United States Patent No. 4,032,222 ("the '222 patent"). A patent infringement suit was brought in the United States District Court for the Eastern District of Louisiana, jurisdiction being founded under 28 U.S.C. § 1338. The United States District Court for the Eastern District Court of Louisiana entered summary judgment of non-infringement (Appendix, pp. 6a-11a). The critical issue was the meaning of the word *viewing angle*

in claim 1 of the patent,[1] a term which was not defined in the patent or in the file wrapper, but is a term of art in display design. In opposition to summary judgment, Digicourse submitted affidavits of two experts defining the meaning of the term *viewing angle* to one of ordinary skill in the art of display design. Mr. Muir, an expert with twenty-four years of experience, and Mr. Lapeyre, a renowned patentee with over 100 patents to his name and with forty years of experience, explained that the term *viewing angle* as known and understood by one of ordinary skill in the art is "the angle formed by a line from the eye of the observer to the *center* of the display, to the plane of the display," (Muir Affidavit, Appendix, p. 14a, par. 5) and that given this meaning, each of the accused devices literally incorporates each of the features of claim 1 of the '222 patent (Lapeyre Affidavit, Appendix, p. 17a). The defendants denied that the term *viewing angle* had the meaning commonly accepted by a person skilled in display design as ascribed by Messrs. Muir and Lapeyre. Yet defendants submitted *no* evidence of any other meaning.

On appeal, the CAFC acknowledged that the term *viewing angle* is a term of art. (Opinion n.2, Appendix, p. 2a.) Nevertheless, the CAFC ignored the only record evidence of the

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[1] Claim 1 of the '222 patent set out the claimed invention:

> 1. A self illuminated readout having a glare and reflection control for ambient light comprising:
>
> a. a casement having viewing opening therein for viewing inside a casement front plane,
>
> b. a light emitting display unit positioned inside said casement in view of said opening disposed in a second plane inclined at an angle of the order of 25° to 60° to said front plane, and
>
> c. view limiting shield means carried by said casing and positioned in the light path between the light emitting display and an observer so that the *viewing angle* is restricted to less than 90° relative to the plane of said display unit thereby to eliminate reflections of external objects from the display unit.

meaning of this term of art and took it upon itself to define via *judicial notice* what *it* perceived as the meaning to one of ordinary skill. The CAFC held that "we can take judicial notice of its common meaning and appellant asserts no other. It is the angle at which something is viewed measuring from a reference plane, here that of the display." (Opinion n.2, Appendix, p. 2a)

There is only one record meaning of the term *viewing angle* as that term is known and understood by one of ordinary skill in the art. It is the angle formed from the eye of the observer to the *center* of the display, to the plane of the display (Muir Affidavit, Appendix, p. 14a, par. 5), and not as *judicially noticed* by the CAFC, the angle measured from any undefined position on the display. Not only is the CAFC's *judicially noticed* definition of *the viewing angle* contrary to the only record evidence, but on its face does not even geometrically define an angle, let alone *the viewing angle* as this term is known and understood by one of ordinary skill in the display art. The CAFC's statement that "appellant asserts no other" definition is directly contrary to Mr. Muir's affidavit, which was clearly pointed out to the CAFC, and formed the basis of Digicourse's appeal.

Reasons for Granting the Petition.

When Digicourse filed the present patent infringement action, it claimed a jury trial as guaranteed it under the Seventh Amendment to the Constitution of the United States. It did not claim a trial by judge, and likewise, it certainly did not claim a trial by the Federal Circuit. When the Federal Circuit was created, the greatest fear was that it would ignore the record evidence and substitute its own views, thus usurping the constitutional fact-finding function of the jury. This is exactly what happened here.

The claimed invention calls for a structure that restricts *the viewing angle* to less than 90°. As acknowledged by the CAFC, the term *viewing angle* is a term of art not defined in the patent documents (Opinion n.2, Appendix, p. 2a). Thus it must be given its meaning to one of ordinary skill in the art. Digicourse submitted affidavits of two respected experts with a total of at least sixty-four years of experience, explaining that the term *viewing angle* as known and understood in the art is the angle measured to the *center* of the display, and that given this definition, each and every accused device literally incorporated each of the features of claim 1 of the patent. Defendants denied the meaning ascribed by Messrs. Lapeyre and Muir, but submitted no evidence of any other meaning.

The law is indisputable that, when summary judgment is at issue, all facts must be taken in a light most favorable to the non-movant. *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962). The CAFC itself acknowledged that the term *viewing angle* is a term of art, and it is fundamental that it be given its factual meaning to one of ordinary skill in the art. *Fromson* v. *Advanced Offset Plate, Inc.*, 720 F.2d 1565, 1571 (Fed. Cir. 1983). With total disregard for this rule, the CAFC ignored the only record evidence of the meaning of this term of art, and under the guise of *judicial notice* based its decision on a definition of *the viewing angle* not only contrary to the only record evidence, but moreover, not even before the district court.

Digicourse has the unquestionable right to have the meaning of this disputed technical term, which is acknowledged to be a term of art, determined by a jury, not by a judge, and certainly not by the Federal Circuit. In ignoring the only record evidence as to the meaning of this term of art, and by taking it upon itself to resolve via *judicial notice* such a material question of fact, the CAFC blatantly violated the Seventh Amendment, and deprived Digicourse of its right to a jury trial. The CAFC

cannot, as it has done here *on summary judgment*, take a term of art in the claim which term is not defined in any patent documents, ignore the only record evidence of its meaning, and unilaterally substitute its own contradictory meaning. In the words of Justice Cardozo, taking *judicial notice* of disputed facts is to deny the very fundamentals of a trial. *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U.S. 292, 300-302 (1937).

The role of the fact-finder lies with the jury, not with the judge and certainly not with the Federal Circuit. In cases of summary judgment, the court must, as a matter of law, view the evidence most favorable to the non-moving party. The CAFC was created as an *appellate* court, not as a de novo court and certainly not as a substitute for the jury. Since the institution of the CAFC it has been constantly criticized for ignoring the record evidence and setting itself up as a specialized patent judge and jury. The CAFC cannot *on summary judgment* ignore affidavits, let alone take *judicial notice* of the very facts at the heart of the dispute. This rule of law is the foundation upon which America's jury trial system is built. To allow the CAFC *on summary judgment* to ignore the only record factual evidence and decide itself via *judicial notice* the disputed meaning of a critical term of art is nothing more than to abrogate the jury trial system. It is imperative to the preservation of the jury system that the CAFC be instructed once and for all of its function as an appellate court.

Conclusion.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix.

Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

DIGICOURSE, INC.,

Appellant,

v. Appeal No. 85-2185.

AMA DISTRIBUTORS, INC., ET AL.

Appellees.

DECIDED: February 26, 1986

Before RICH, DAVIS, and NIES, *Circuit Judges*.

RICH, *Circuit Judge*.

DECISION

The summary judgment of non-infringement entered 5 March 1985 by the United States District Court for the Eastern

District of Louisiana (Mentz, J.) in favor of appellees, AMA Distributors, Inc., et al. (AMA) and against appellant Digicourse, Inc. (Digicourse), assignee of United States Patent in suit No. 4,032,222 ('222 patent) is *affirmed*.

OPINION

Digicourse's contention that the meanings of the terms "display,"[1], "viewing angle,"[2]" and "observer"[3] are disputed issues of material fact that preclude summary judgment of noninfringement fails because a reading of the '222 patent and its prosecution history, without resort to extrinsic evidence, establishes clear and unambiguous meanings for these terms. They are not technical terms requiring experts to explain them. Based upon the clear language of the claims, the district court properly construed the claims as a matter of law, *see McGill, Inc. v. John Zink Co.*, 736 F.2d 666, 671, 221 USPQ 944, 948 (Fed. Cir. 1984), and found, based on its construction, that AMA's video games do not infringe the claims either literally or under the doctrine of equivalents.

Literal Infringement

An Observer's Viewing Angle and the Viewing Shield

It could not be more clear, from the patent itself and its prosecution history, that its claims define a *view-limiting shield*

[1] The patent document makes perfectly clear what is meant by "display" in the claims, the complete term being "light emitting display."

[2] Appellant's brief aptly remarks that " 'viewing angle' is a well-known and accepted term commonly used in the art." The "art" is nothing more than observing things. We can take judicial notice of its common meaning and appellant asserts no other. It is the angle at which something is viewed measured from a reference plane, here, that of the display.

[3] An observer is simply a person who observes something.

structure which limits an observer's ability to view the display to a viewing angle of less than 90° independently of the physical characteristics or positioning of the observer or anything else. Digicourse's contention that "observer" and "viewing angle" do not include the angle at which an eight-foot giant views the display but only the angle at which a person of "normal" height in a "normal" viewing position views the display is unsupported by the language of the patent. Furthermore, attempting to define one or even a small range of "normal" viewing angles or positions is not feasible because the '222 structures are used on compasses for boats, watches, calculators, and a variety of other articles so that the observer's viewing positions vary greatly and none is "normal."

Entire Display

Clause (c) of claim 1 requires that the "view limiting shield means . . . eliminate reflections of external objects from the display unit." The district court's interpretation that this language means "that no portion of the display screen can be visible to an observer attempting to view the display at an angle of 90°" was proper as well as sensible.

It is undisputed that a portion of each AMA display involved in this appeal can be viewed at 90° despite the view-limiting shield, and, from that fact, the district court properly concluded that the AMA games do not literally infringe; the claims by their plain meaning, and as interpreted, require that none of the display be viewable at 90° to the plane of the display.

Digicourse argues that the AMA games cannot escape infringement merely because what it calls a *de minimis* portion of each AMA display can be seen from 90°. It is clear to us that the district court, by its Memorandum Opinion of Dec. 31, 1984, for example, agreed with Digicourse that it is not enough that one can see an unused portion of the AMA display

screen from 90°, but must be able to view information displayed on the screen by the particular software application program. More importantly, it is plain from Digicourse's own exhibits that more than a *de minimis* portion of each AMA *display* is viewable from 90°, and to the extent Digicourse argues to the contrary, we think it misperceives the evidence.

Furthermore, we find untenable Digicourse's related argument, which is, apparently, that if the AMA games are to escape infringement, the *whole* of each display must be viewable from 90°. This argument is based on the premise that for a display to have meaningful use, all of the useable information on it must be viewable free from reflections. Although we agree with that premise to the extent that the total absence of reflections on a display from all possible viewing angles is better than having reflections on part of a display, the proper focus here is on the *structure claimed* in the '222 patent. That claimed structure is not found in the AMA games because the AMA view-limiting shields are not "positioned in the light path between the light emitting display and an observer so that the viewing angle is restricted to less than 90° relative to the plane of said display unit thereby to eliminate reflections of external objects from the display unit." That the AMA games might therefore have some reflection problems is the price AMA pays to avoid infringing the '222 claims, and simultaneously defeats Digicourse's position that AMA's games infringe.

Doctrine of Equivalents

Digicourse is not entitled to treatment of the AMA games as equivalents to the subject matter of the '222 patent claims, as the district court properly held, because the prosecution history shows that the examiner twice rejected a claim (claim 3) to structure that prohibited viewing *only a portion of*, rather

than the whole, display, in view of a number of prior art references. Digicourse's argument that it gave up structure, defined in cancelled claim 3, that blocked from a 90° view "at least" *a portion* of the display but did not give up structure, defined in claim 1, that blocks *all but* a *de minimis* portion of the display is misplaced because, as stated above, *more* than a *de minimis* part of each AMA display on appeal can be viewed from 90°. Thus, each AMA game is quite clearly subject matter that Digicourse gave up in response to the examiner's rejection in view of the prior art, namely, Hosokawa et al., Heilmeier et al., and Shreve, which plainly disclose devices having view-limiting shields that block at least or very nearly as much of the display as do the AMA games. We appreciate and agree with appellant's argument that the '222 claims are entitled to *some* range of equivalents, but we also agree with appellee that they are not entitled to the particular equivalency sought to be applied here because that is the very thing that was given up during prosecution. It is of no importance at what exact point in the prosecution that subject matter was surrendered.

Costs

Appellees' contention that they should be awarded "fees" on appeal because this appeal was frivolous is denied. They are, however, entitled to recover costs pursuant to Rule 39, Federal Rules of Appellate Procedure.

United States District Court
Eastern District of Louisiana

DIGICOURSE, INC.	CIVIL ACTION
VERSUS	NUMBER: 82-3433
AMA DISTRIBUTORS, INC., ET AL	SECTION: "I" (2)

Paul J. Hayes, Esq., Weingarten, Schurgin, Gagneloin, & Hayes, One Boston Street, Boston, MA. 02109

James R. Uhlir, Esq., Christenson, O'Conner, Johnson & Kindness, 2701 Westin Bldg., 2061 Sixth Avenue, Seattle, WA. 98121

MENTZ, District Judge

MEMORANDUM OPINION

The defendants herein have brought motions seeking summary judgment on the infringement issue with respect to all thirty-one of the contested video games. The Court heard oral argument on these motions on October 31, 1984, and took the matter under submission at that time.

The Court is not going to rehash what has already been stated in earlier opinions and minute entries. The prior record is clear. Instead, we intend to rule on the literal and equivalent infringment issues by placing much reliance on what was said in the earlier opinions.

Literal Infringement

The Court has already stated what it believes to be the proper construction of the Digicourse patent. (See May 21, 1984 Memorandum Opinion). Thereafter, on June 5, 1984, we issued a minute entry which went to the heart of the literal infringment issue.[1] The parties were required to state whether the following statement was true or false with respect to each of the thirty one games:

> At every right angle from the display screen (i.e., light emitting display), an observer positioned outside of or above the view-limiting shield (e.g., from the position of the so-called "eight-foot giant") is prevented from viewing any portion, however small, of the display screen by the view-limiting shield.

An answer of "true" would mean that the game in question did infringe on the Digicourse patent. A "false" answer would indicate that there was no literal infringement. The parties agree that the above statement is false with respect to twenty-seven of the contested games.[2] Accordingly, these twenty-seven games do not literally infringe upon Digicourse's patent.

No agreement was reached with respect to four games. The Court appointed a special master who was charged with con-

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[1] Prior to the May 21, 1984, Memorandum Opinion, the parties had entered into a stipulation which we thought was dispositive of the literal infringement issue. Digicourse informed us, however, that we had misconstrued the intended import of the stipulation. Rather than relying on the contested stipulation, we issued the June 5, 1984, Minute Entry.

[2] The twenty-seven games in this group are Pac Man, Ms. Pac Man, Galaxian, Galaxia, Galaga, Blueprint, Lazarian, Ms. Pac Man (mini), Wizard of Wor, Solar Fox, Satans Hollow, Tron, Jungler, Turtles, Super Cobra, Astro Invaders, Scramble, Strategy, Frogger, Astro Blaster, Donkey Kong, Donkey Kong Jr., Popeye, Xevious, Route 16, Dambusters and Monte Carlo.

ducting an independent investigation to determine whether the above statement was true or false with respect to each of the remaining games. All parties agree that three of the four games (Quasar, Piranha, and Pepper II) actually inspected by the special master do not infringe. Digicourse, however, maintains that the games inspected by the special master are not duplicates of the games actually put in commerce by the defendants. Moreover, Digicourse claims that its agents inspected each of these three games in 1982. Based upon the drawings and pictures taken by the agents at that time, Digicourse has offered affidavit testimony that the view-limiting shield would prevent an observer from viewing any portion of the display screen in each of the three games as they existed in 1982. (See Record Document 270a, Exhibits A, K, and L.) When a disputed question of fact exists on a summary judgment motion, as is the case here, all factual inferences must be resolved in favor of the non-movant. *Casey Enterprises, Inc. v. American Hardware Mutual Insurance Co.*, 655 F.2d 598, 602 (5th Cir. 1981); C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2727 (2d Ed. 1983). Thus, summary judgment is inappropriate, and Digicourse will be allowed to present its case on literal infringement with respect to the Quasar, Piranha, and Pepper II games.

The fourth game inspected by the special master was Robby Roto. The special master concluded that an observer could view the bottom 2½ inches of the CRT tube from a position outside of or above the view-limiting shield. Digicourse makes two objections to the special master's findings. First, they argue that the term "CRT tube" is not synonymous with the term "light emitting display" used in claim 1(c) of the patent. Digicourse claims that the light emitting display refers to the portion of the CRT tube that is lit after a program is inserted into the game. Because there was no program in the Robby Roto game inspected by the special master, Digicourse con-

tends that the special master could not make a proper determination. There may be some merit to Digicourse's argument. The patent was designed to eliminate the reflection of unwanted glare from the display unit. Claim 1(c) speaks of a view-limiting shield being positioned between the observer and a *light-emitting display*. Thus, when the patent is interpreted in the way most favorable to Digicourse, as must be done on a summary judgment motion, *id.*, the display unit would consist of only that portion of the display screen that is lit after a program is inserted into the game.

Secondly, Digicourse challenges the Robby Roto determination because the special master took measurements from the curved surface of the CRT tube and not from the plane of the display. Claim 1(c) clearly states that "the viewing must be restricted to less than 90° *relative to the plane of said display*". Digicourse has introduced affidavit evidence indicating that the plane of the display is that plane which is tangent to the center of the display (in this case, the plane that is tangent to the center of the CRT tube). (Record Document 270a, Exhibit N.) Evidence also exists that when measurements are taken relative to the plane of the display, no portion of the Robby Roto display can be seen at any right angle to the display. (Record Document No. 270a, Exhibit N.) Thus, the partial summary judgment with respect to the Robby Roto game is inappropriate.

Equivalent Infringement

The equivalency issue has been addressed once before by this Court. In our earlier opinion, we concluded that the prosecution history estoppel doctrine precluded Digicourse from asserting that its patent covered any device wherein the view-limiting shield prevented an observer from viewing any less than the whole light-emitting display. (See February 28, 1984,

Memorandum Opinion.) This holding was based on the fact that Digicourse had given up this claim during the prosecution of its patent.[3] Nothing in the most recent briefs of the parties dissuades us from our earlier view. If anything, our belief has been reinforced because it has become obvious that the Digicourse patent was introduced into a crowded field. Thus, its claims must be construed narrowly. *Rubinstein v. Silex Co.*, 73 F.Supp. 336 (S.D.N.Y. 1947). Accordingly, the Court believes that partial summary judgment on the issue of equivalent infringment with respect to all thirty-one games is warranted.[4]

CONCLUSION

The defendants' motion for partial summary judgment on the issue of literal infringement is GRANTED in part and DENIED in part. It is GRANTED with respect to the twenty-seven games relative to which the parties have entered into stipulations based on the Court's June 5, 1984, Minute Entry.[5] It is DENIED with respect to the four games relative to which the parties have failed to enter into stipulations.[6] Furthermore, the defendants' motion for partial summary judgment on the

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[3] As the court stated in *Hughes Aircraft Co. v. U.S.*,:

> The doctrine of prosecution history estoppel precludes a patent owner from obtaining a claim construction that would resurrect subject matter surrendered during the prosecution of his patent application.

717 F.2d 1351, 1362 (Fed. Cir. 1983).

[4] For a complete discussion of this issue, see the Court's February 28, 1984, Memorandum Opinion.

[5] For a complete list of these games, see *supra* note 2.

[6] These four games include Pepper II, Piranha, Quasar and Robby Roto.

equivalent infringement issue is GRANTED with respect to all thirty-one games.

New Orleans, Louisiana, this 31st day of December, 1984.

_____

UNITED STATES DISTRICT JUDGE

United States Court of Appeals for the Federal Circuit

DIGICOURSE, INC.,
Plaintiff-Appellant.

vs. Appeal No. 85-2185

AMA DISTRIBUTORS, INC., ET AL.,
Defendants-Appellees.

Judgment

ON APPEAL from the U.S. District Court of Louisiana, Eastern District in CASE NO(s). (C.A. 82-3433-I)

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED: AFFIRMED.

ENTERED BY ORDER OF
THE COURT

DATED Feb. 26, 1986

FRANCIS X. GINDHART,
CLERK

ISSUED AS A MANDATE: April 28 1986

United States Court of Appeals for the Federal Circuit

DIGICOURSE, INC., Appellant.

Appeal No. 85-2185

v.

AMA DISTRIBUTORS, INC., ET AL., Appellees.

ORDER

A petition for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED by the Court that the petition for rehearing in banc is declined.

FOR THE COURT

Francis X. Gindhart, Clerk

4/21/86

Date

cc: Mr. Paul J. Hayes
Mr. James R. Uhlir

STATE OF LOUISIANA

PARISH OF ORLEANS

AFFIDAVIT

James H., Muir

James H. Muir, being duly sworn, deposes and says:

1. Attached to this Affidavit is a statement of my education and experience.

2. I have read U.S. Patent 4,032,222 and I am familiar with the drawings, specification and claims. I have also read the file history of the application from which the patent matured.

3. In my opinion it is clear from the specification and drawings that the invention is designed to allow an observer to read information on the entire display and at the same time eliminate reflections to the observer. Throughout the specification, the patent emphasizes the necessity for the observer to read the information on the entire display. The term "read" and variations thereof are used throughout the patent specification.

4. The word "display" means to one of ordinary skill in the art, the area of the screen which presents the readable information required by the observer to utilize the device.

5. The word "viewing angle" means to one of ordinary skill in the art, the angle formed by a line from the eye of the observer to the center of the display, to the plane of the display.

6. In my opinion it is clear from the specification, drawings and claims that the term "display" can only reasonably mean the entire display and cannot be reasonably interpreted to mean "a portion" of the display. In each of the embodiments shown in the patent (Fig. 1 to 10) the observer must see the entire display to operate and utilize the device. Because of the shield

as shown in Fig. 10 of the patent, the only way the observer can see the entire display and thus utilize the device in any meaningful manner, is at a viewing angle of less than 90° to the display.

7. Without a shield as shown in Fig. 10, there would be no restriction on the viewing angle and the entire display could be viewed at 90°. Once the shield is positioned as shown in Fig. 10, the viewing angle is thus restricted to less than 90° relative to the plane of said display. In my opinion, Claim 1 as understood by one of ordinary skill in the art covers all the embodiments shown in the patent.

8. Claim 3 presented during the prosecution of the patent is significantly broader than Claim 1. Claim 3 would allow 99% of the information on the display to be viewed at 90° and also 99% of the information on display to have reflections thereon and satisfy Paragraph D of Claim 3. In contrast substantially none of the information on the display of the Pacman game is viewable at 90° and substantially none of the information on the display of the Pacman game will have reflections thereon.

Further Deponeth sayeth not.

_____

James H. Muir

Subscribed and sworn to before me, this 27th day of March, 1984.

_____

Notary Public

My Commission Expires: At Death

JAMES H. MUIR

Mr. Muir is President of Dimension V, Inc., a Florida corporation specializing in consulting in areas of industrial design and human factors. Mr. Muir is a graduate of Syracuse University, receiving a Bachelor of Industrial Design in 1959.

Employment History

For the last 14 years Mr. Muir has consulted on product development and design in the areas of human factors and industrial design for 400 corporations including Sperry, Bendix, Harris Corporation and Martin Marietta.

Mr. Muir is an expert in the field of display design and engineering and has been involved in this field for the past 24 years.

AFFIDAVIT

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared James M. Lapeyre, who after being first duly sworn, did depose and say:

(1) That, he, James M. Lapeyre, is the inventor of the apparatus described and claimed in United States Patent #4,032,222;

(2) That he has been involved in the design of mechanical and electro mechanical apparatus for the past forty (40) years;

(3) That Claim 1 of the patent as read and understood by one of ordinary skill in the art reads directly on the accused Pac Man device;

(4) That the viewing angle in the Pac Man game is as called for in Claim 1, restricted to less than 90°. The viewing angle in the Pac Man game is 60°. The display is angled within the range called for in Paragraph B of Claim 1 and the shield is positioned as claimed by his invention to restrict the viewing angle and eliminate reflections from all portions of the display to the observer.

(5) That the term, viewing angle, used in Paragraph C, Claim 1, is a well known and accepted term of art used to describe the angle of view of an optical display and is not a lexicographers expression;

(6) Each of the embodiments shown in Figures 1-10 of the Patent concerns an optical display that is viewed by an observer at a variety of different heights extending well above the display.

In these examples it is necessary for the shield to extend sufficiently far enough to prohibit direct viewing of the display

at 90°. Otherwise, reflections to the observer would be present. The relationship between the display and observer's height in the Pac Man game is such that the display is not viewed well above the display to warrant the elongation of the shield. The shield in the Pac Man game is positioned as taught and claimed in his Patent to eliminate all ambient reflections to the observer.

(7) That the Shreve reference and the comments of his attorney, Mr. A. R. Theibault, should be taken in the proper technical context of the reference. The refrigerator shown in Shreve is viewed by an observer of a height above the display which will allow ambient light to reflect into the eyes of the observer. Under these circumstances it is necessary for the shield to be elongated sufficiently to prohibit viewing at 90°, otherwise, reflections would be present to the eye of the observer.

It was not his intention to limit the claims as suggested by the Court, nor does the statement made by Mr. Theibault when read in its proper technical context indicate otherwise.

(8) Plaintiff is not attempting to cover the subject matter set forth in Claim 3 of the Prosecution for to do so would be an attempt to cover games wherein reflections on a portion of the display are visible to the observer. On the contrary, reflections to the observer of the Pac Man game are eliminated from all portions of the Pac Man display.

(9) The Pac Man video game and the other video games set forth in the expert report perform substantially the same function, operation, and result as the invention in U.S. Patent #4,032,222.

JAMES M. LAPEYRE

Sworn to and subscribed
before me this 7th day
of March, 1984.

NOTARY PUBLIC
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Commissioned for Life